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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 465.

IRA S. BUSHEY & SONS, INC., Employer and THE STATE INSURANCE FUND, Insurance Carrier,

Petitioners,

v.

FRANK A. CARDILLO, Deputy Commissioner, Second Compensation District, THORLEIF JOHANSEN, Claimant, AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, Insurance Carriers,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the mandate of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 19, 1955.

Citations to Opinions Below

The opinion of the District Court, printed in the Record of the court below, at pages 30a-33a, is unreported. The opinion of the United States Court of Appeals for the Second Circuit, made a part of the Record in the Court below, is unreported to date and appears in Appendix B hereto, *infra*, pages 22-39.

Jurisdiction

The Judgment of the United States Court of Appeals for the Second Circuit was entered on July 19, 1955, Appendix C, *infra,* pages 40, 41. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

1. Where there admittedly was no impairment of wage earning capacity, was the award to claimant Johansen for a partial loss of hearing contrary to law as enacted by the Congress and therefore illegal and void.
2. Where the only provision relating to occupational disease is contained in the definition of injury so as to include occupational disease, thus leaving it entirely to the deputy Commissioners to determine what an occupational disease is; when it arises; in whose employ the disablement occurred, without any statutory rules or guides of conduct is an unlawful delegation of legislative power.
3. Did the decision of the court below holding liable the carrier who last insured the "liable" employer to the exclusion of two other carriers for the same employer deprive said last carrier of its constitutional rights under its contract of insurance in direct violation of the provisions of the Constitution of the United States.

Statute Involved

The statutory provisions involved are in the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 902, Pars. 2, 10;

Figures in Parenthesis refer to page in Certified Record.

33 U. S. C. 903, Par. a; Article 1, Section 1 and Article 1, Section 8, Par. 18 of the Constitution of the United States and Amendment V of the Constitution of the United States. They are printed in Appendix A, *infra,* pages 20, 21.

Statement

In the first instance, an order was filed by Deputy Commissioner Cardillo on July 2, 1954. The order was allegedly made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C., secs. 901, *et seq.,* wherein claimant-respondent's claim for a compensation award was granted and an award was made against the employer, Ira S. Bushey & Sons, Inc., and its three insurance carriers, American Mutual Liability Insurance Company, Hartford Accident and Indemnity Company and The State Insurance Fund. The award specifically provided that the aforementioned carriers shall be jointly, severally and equally liable for the award granted (12a).

The award herein was made by the Deputy Commissioner upon his Finding that as a result of claimant's employment he sustained an *injury, occupational in character, consisting of a permanent disability.* This alleged disability was found by the Commissioner to be a 13.8% binaural loss of hearing (11a).

The period of employment, covered by the three insurance carrier appellants indicates the following:

(a) September 16, 1942 to June 1, 1953—3911 days—97.34% of the total employment period with American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company;

(b) June 1, 1953 to September 9, 1953—100 days—2.49% of the total employment period with Hartford Accident & Indemnity Company;

(c) September 9, 1953 to September 16, 1953—7 days —.17% of the total employment period with The State Insurance Fund.

The total number of days employed was 4018 (10a).

The record discloses without dispute that the claimant lost no time from his work (58a). Claimant's own physician testified that the hearing loss existed in 1950 prior to the State Insurance Fund coverage (66a, 67a). The claimant was not in any way disabled industrially (73a). To the same effect another doctor testified that there was no industrial disability (96a).

Deputy Commissioner Cardillo made the award appealed from on the ground that "the last employer in whose employment claimant was continuously exposed for eleven years is liable for the payment of compensation" and "that the insurance carriers above named who successively covered such liability of the employer during the period of claimant's last employment, are jointly, equally and severally responsible * * *" (11a).

Pursuant to the provisions of Section 21 of the Act, *supra,* there was filed and served a joint bill of complaint in equity for the purpose of reviewing the decision and the order entered by the said Deputy Commissioner on July 2, 1954 (2a to 8a incl.). After issue was joined (17a-20a incl.) motions for summary judgment were made by the defendants and cross motions for summary judgment were made by the plaintiffs. Argument was had, briefs were submitted and an opinion was handed down by Judge Robert A. Inch (30a-33a). An order was thereafter entered on January 5, 1955 wherein the motions of the defendants-respondents were granted, the complaint was dismissed and the cross motions of the plaintiffs were denied (21a. 22a).

It was from the above opinion and the order of January 5, 1955 entered thereon that the employer and its three carriers appealed to the Court of Appeals on January 21, 1955 (27a-29a incl.).

The court below affirmed the order of the District Court but remanded to that court with directions to fix the liability not only on the "last employer" but upon the "last carrier". The other two carriers were relieved from all liability. The "Last Carrier" is the petitioner, The State Insurance Fund.

Reasons for Granting This Writ

I. The Deputy Commissioner's Award, the affirmance thereof and its remanding are illegal and void. The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901, *et seq.*, was specifically enacted to provide compensation for injury claims for *disability** (33 U. S. C. A. 903), Appendix A, *infra,* page 20. This section states that "Compensation shall be payable * * * in *respect of disability.*" The word disability is expressly defined and the Act states that " 'Disability' means incapacity because of injury to *earn the wages* which the employee was receiving at the time of injury in the same or any other employment" (33 U. S. C. A. 902 [10]), Appendix A, *infra,* page 20. The basis for any award under the statute is the wage-earning concept, "which is the only principle that holds Compensation Law together as a consistent whole." *Iacone* v. *Cardillo,* 2 Cir., 208 F. 2d 696. Yet, the record herein does not disclose nor even infer that the claimant lost the use of his ears to the detriment of his wage earnings.

Larson on Workmen's Compensation says that:

> "In compensation, unlike tort, the only injuries compensated for *are those* which produce *disability* and thereby presumably affect earning power." (Sec. 2.40)

* All italics supplied.

The undisputed facts, and they are admitted by everyone, are that the claimant has not lost any of his wage earning capacity either in his present employment nor in any other type of employment. As a matter of undisputed fact, the claimant is still working at his usual employment and at higher pay.

The award herein is a "schedule award." But schedule awards are not put up as a "price" on certain parts of the body.

> "The word 'disability' in the law as we read it therefore, means 'impairment of earning capacity' and not 'loss of a member'." See Matter of Marhoffer v. Marhoffer, 220 N. Y. 543, 548.

See also:

> *Matter of Petrie,* 215 N. Y. 335.

An existing disability is generally reflected in wage earning capacity. *Schurick* v. *Bayer Co.,* 272 N. Y. 217, 220.

Applying the definition of "disability", this claimant manifestly had no disability within the meaning and intent of the Act. *The Commissioner made no finding on the question when disability began.* The finding of a "permanent partial disability" by the Commissioner is completely against all of the admitted facts, contrary to specific law and is unjustified and unwarranted.

The court below construed the meaning of the word "disability" differently from the express definition and limitation of the Act and therefore was in violation of all of the accepted rules of statutory construction. It is for Congress to determine the definition as they explicitly did and not for the courts or commissioners to interpolate.

The language of the Act is plain and there is absolutely nothing in the Act to even suggest a contrary intention.

The power to remedy the situation rests solely with the Congress.

There is no evidence in this case that the claimant suffered a wage loss in the sense in which the term was intended by Congress to be used.

The present decision of the court below complained of is an attempt to get by construction what Congress did not give by specific enactment.

Under the legislative mandate the interpretation must be in accord with the meaning ascribed in the Statute.

See *Milwaukee* v. *Ind. Comm.*, 263 N. Y. 662.

The question herein is novel and of first impression.

Looking to the decisions of the courts in other jurisdictions to guide us, we find that they have held that compensation is not payable for an injury as such but is based on the loss of earning power, and that disability means incapacity or disability to work. In other words, impairment or lessening of earning capacity.

Fourth Decennial Digest, Vol. 33, Workmen's Compensation, Sections 3 and 6 and cases cited therein;
Wright v. *Cane Run,* 90 S. W. 2d (Ky) 36; 149 A. L. R. 413;
Thomas v. *Radio,* 2 La. App. 554;
Runnels v. *Allied,* 270 Mich. 153;
Re Donahue, 198 N. E. (Mass.) 149;
Schneider, W. R., The Law of Workmen's Compensation, 2d Ed., Vol. 2, Sec. 398, p. 1328;
Larson, The Law of Workmen's Compensation, Vol. 2, Ch. 10, Sec. 57, p. 1.

The decision of the Court of Appeals herein determines a most important question of law which never has been, but should be settled by this Court. The lower court's deci-

sion will affect every industry wherein noise emanates as a result of the work therein performed. It is a question national in scope and not confined to any one particular industry.

The Court of Appeals herein has so far departed from the existing statute and has sanctioned such departure by the Administrative Agency involved so as to call for an exercise of this Court's power of supervision.

The Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives" Article 1, Sec. 1, Appendix A, *infra*, page 21. And the Congress is empowered "To make all laws which shall be necessary and proper for carrying into Execution" its general powers. Article 1, Sec. 8, par. 18, Appendix A, *infra*, page 21. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, and its right to leave to selected instrumentalities the making of *subordinate rules only* within prescribed limits and the determination of facts to which the laws enacted by the Congress apply.

> *Panama Refining Company* v. *Ryan*, 293 U. S. 388; *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 529.

Surely, the Congress never authorized nor intended for the Courts or any Administrative Agency to determine substantial rights such as the date of disablement, nor that there is such a thing as an "*injury occupational in character*," nor the right to change contracts entered into between parties.

This court in *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 199, said:

> "We are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability'. Congress knew the difference between 'disability' and 'injury' and used the words advisedly. This view is especially compelling when it is noted that the two words are used in the same sentence of the limitations provision; therein 'disability' is related to the right to compensation, while 'injury' is related to the period within which the claim must be filed. Furthermore, Congress defined both 'disability' and 'injury' in the Act [Secs. 2 and 10], and its awareness of the differences is apparent throughout. Thus, we think that when Congress used 'disability' and 'injury' in the same sentence, making each word applicable to a different thing, it did not intend the carefully distinguished and separately defined words to mean the same thing. Congress meant what it said when it limited recovery to one year from the date of injury, and 'injury' does not mean 'disability' * * *".
>
> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes, but that does not give us the power to rewrite the statute * * *."

The above quoted sections are in Appendix A, *infra*, page 20.

See also:

Guessefeldt v. *McGrath*, 342 U. S. 308, 321.

Although a liberal and reasonable construction of the act is one thing and that reading language into it which

it does not contain or giving effect to it which its language does not permit is quite another.

Pillsbury v. *United Engineering Co.,* 342 U. S. 197;
Christensen v. *United States,* 2 Cir., 194 F. 2d 978.

This Court in the case of *New York Central R. R. Co* v. *White,* 243 U. S. 188, in upholding the constitutionality of the New York Act said that it was not unreasonable for the state, while relieving the employer from responsibility for damages measured by common law standards, "to require him to contribute a reasonable amount * * * *by way of compensation for loss of earning power incurred in the common enterprise* * * *."

Schneider, W. R. in The Law of Workmen's Compensation, 2d Ed. Vol. 2, Sec. 398, p. 1328, Thomas Law Book Company, St. Louis, Missouri, 1932, stated that "Disability or incapacity for work must be found to exist in order to justify a disability benefit award."

Pollack, a consultant to the C. I. O., described one of the objectives of the compensation system as providing medical care and cash payments "to restore the worker to health and *replace lost income*" (Pollack, J.: Workmen's Compensation for Railroad Work Injuries and Diseases, 36 Cornell Law Quarterly, 236, 1951).

The judicial power of the court below in the instant case is confined to its declaration of what the law is and not to declare what the law should be. This power is non-delegable and any attempt to do so is clearly illegal, void and unconstitutional.

It is established law that the only delegable powers are those that ascertain facts and to promulgate rules and regulations. Even in such instances the legislature declares the policy of the law and fixes the legal principles.

Schechter v. *U. S.,* 295 U. S. 495;
Peters v. *U. S.,* 8 Cir., 20 F. 2d 741;
Western Union Tel. Co. v. *Myatt,* Cir. Kan., 98 F. 335.

It follows, *after the law has been enacted,* the Administrative Agency (in this case the Labor Department) may in its reasonable discretion enforce such law under legislative standards.

We have substantial rights involved herein and there must be a law in existence before liability is determined.

Judicial authority is derived from the Constitution and the law made thereunder. Federal Courts are Courts of limited jurisdiction.

Newcomb v. *Burbank,* 2 Cir., 181 F. 334.

The Federal Courts must find their jurisdiction in express provisions of federal statutes and have only such powers as are expressly conferred upon them.

In re Hollins, 2 Cir., 229 F. 349, certiorari denied 36 S. Ct. 448.

This court said:

"The general rule is that the language of the act, must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it."

Amy v. *City of Watertown,* 130 U. S. 320, 324.

"Where the statutory language is clear, and unequivocal, there is no basis for arguing that it should be tortured or amended by judicial construction to bring about what the court might consider a more desirable result."

Pillsbury v. *United Engineering Co.,* 342 U. S. 197; *Voris* v. *Eikel,* 5 Cir. 200 F. 2d 724.

This court said in *Crooks* v. *Hanelson,* 282 U. S. 55, 60:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."

It went on to say:

> "Laws enacted with good intention, when put to the test, frequently, and on the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

See:

> *Chung Fook* v. *White,* 264 U. S. 443, 445;
> *Pillsbury* v. *United Engineering Co.,* 342 U. S. 197.

If Congress intended other than what it had legislated, it would have so provided in plain and understandable words.

If the Labor Department herein finds it onerous or difficult it is their right to petition Congress for any changes and not act in any legislative capacity as it has done in this case.

Section 37 of the New York Workmen's Compensation Law defines disability in occupational disease cases as,

"the state of being disabled from earning full wages at the work at which the employee was last employed."

The New York Occupational Disease Law was patterned after the British Compensation Law which required as one of the conditions of obtaining compensation for an occupational disease, that the attending surgeon certify that the workman is suffering from one of the diseases of the act "and is thereby disabled from earning full wages at the work at which he is employed."

> *Willis' Workmen's Compensation Acts,* ed. 31, London, Toronto, Ont., and Bombay & Co., Ltd., (1938).

Yet the award herein for "disability" is the equivalent of health or life insurance. The courts have held that the law must not be so construed.

> *McNeelly* v. *Sheppard,* 5 Cir., 89 Fed. 2d 956.

It is an inevitable conclusion that if we ever cut loose from the earning capacity concept and start recognizing the principle that compensation is payable for physical impairment as such, we will have no way of knowing where the process will stop. The decision of the Court below may be very satisfying from an administrative point of view, yet we must take the Longshoremen's Act as we find it and as the Congress enacted it and we must leave it to the same Congress for its attention to any seeming inequalities or uneveness of coverage.

II. The Longshoremen's Act, here under consideration, approved March 4, 1927, was patterned after the New York Workmen's Compensation Law. The New York law at that time made specific provisions with respect to Occupational Diseases (Art. 3) defining disability as being disabled from earning full wages and fixing date

of disablement as fixed by the Industrial Board. It is clear that many of the provisions of the law relating to accidental injuries could not, did not and never was intended to apply to occupational diseases. Yet, in adopting the Longshoremen's Act the only reference to occupational disease is contained in the definition of the term "injury" as meaning accidental injury or death "and such occupational disease or injury as arises naturally out of such employment."

It is thus left to the deputy Commissioners to determine what an occupational disease is; when the date of disablement took effect and which employer shall be liable therefor. No rules of conduct or guides have been set up in the Longshoremen's Act as has been done in the New York Act and is done in the Compensation Acts of the various states. It requires no citation here that an occupational disease is a slow developing disease and may spread out over a man's entire occupational life under a number of employers. To give the deputy Commissioners power to determine all the requirements for compensation therefor without any guides is an unlawful delegation of the legislative power of the Congress (*Mutual Film Co.* v. *Industrial Commission,* 236 U. S. 230).

III. The decision of the Court below in holding The State Insurance Fund, the "last carrier", liable is not only against the undisputed evidence, but is not in accord with established law. It is an invasion of the right to private property, the cancellation and annulment of the right to contract and is not only illegal *per se* but unconstitutional.

The Court below admits by its very language that its decision was arbitrary. It violates the express provisions of the insurance contract and imposes liability not contemplated between the parties when the contract was entered into and is thus illegal and void. The method em-

ployed by the court below is a substitution of that court for the legislative branch of our government which is definitely denied by this court in its decisions.

No extended argument is required to show that the respective insurance carriers assumed their liability under express contract in which the time of commencement, as well as termination of liability, is clearly set out. It is elementary that by such policy of insurance, absent legislation to the contrary, the carrier assumes only such liability as accrues during its coverage period. The policy does not provide for the assumption of liability previously incurred, nor does it provide for the shifting of liability to its successor insurance carrier for liability accumulated during its own policy period.

Thus, the American Mutual was on the risk for *twenty-six* years, during eleven of which the claimant was in continuous employment and the alleged injury complained of came into being and almost developed to its fullest extent.

The Hartford Accident & Indemnity Company insured the liability of the employer for *four and one-half months* to the end of the period during which the Deputy Commissioner found the injury to have been incurred.

The State Insurance Fund was on the risk for only *seven days*.

The respective ratios of coverage are:

American Mutual	97.34%
Hartford	2.49%
State Ins. Fund	.17%

The judgment of the Court below holds the entire award chargeable against The State Insurance Fund, the petitioner herein.

The State Insurance Fund policy will be searched in vain for any provision whereby liability which has ac-

crued before inception of the policy is assumed with either the preceding or passed on to the succeeding carriers.

The action of the Court below in thus levying the award upon the "last carrier" amounts to a complete re-writing of the insurance contract, the inclusion of liability and obligations not contemplated when the contract was undertaken, as well as retroactive change of liability arbitrarily imposed by the Court below without the previous assent of the contracting parties having been obtained.

Nor must sight be lost of the fact that the policy involved herein is in standard form and, before adoption by the insurance industry, were submitted for approval to the various insurance departments and other government agencies having authority with respect thereto.

Contrary to the decision of the Court below the liability of the successive insurance carriers differs from that of the insured employer. Where, as in the case at bar, the employee has been working for one employer only, so that the initial exposure, as well as the ultimate inability to work, are all spanned by the one employment, the imposition of liability upon the employer follows readily. In such a case, the liability of the employer, *qua* employer, to pay compensation benefits is not open to question. However, when the employer, is insured by successive insurance carriers, the precise point at which liability arises must necessarily affect the several insurance carriers.

The problem is variously approached. Some States have solved this problem by arbitrarily fixing a date of disablement. These statutes usually provide, however, for proportionate contributions between the last and the preceding carriers. In such States, the scheme of compensation set up *in the statute* is read into the policy. *Consideration is*

always given to the fixing of the proportionate share to be charged against the several successive carriers. The limited liability assumed by the insurance contract is always respected. Whether the proportionate share of each carrier is determined in the award or provision is made for apportionment—contribution in a separate proceeding between the several carriers, total liability is never imposed upon one carrier without provision being made for an adjustment of the rights and equities between the previous or succeeding carriers.

This is the vice and the error in the decision of the Court below. Imposing liability on the "last carrier" may be common law liability in tort among joint tort feasors, but it is not compensation law. It is not provided for by the Longshoremen's Act either specifically or by inference. The illegality of the decision of the Court below is all the more glaring when it is remembered that the Longshoremen's Compensation Act contains no machinery for proceeding as it has. Moreover, the statute does not grant to the administrative tribunal equitable, or even quasi equitable, jurisdiction. The Deputy Commissioner and the Courts are bound by the statute and the insurance contract and they may not, whether for convenience or expediency, override either. Here, they have done just that.

It is no answer, that the problem of apportioning the liability among the several carriers is difficult. That the problem may not be easy of solution does not justify the act of the Court below. It is respectfully submitted that the imposition of the award as was done herein constitutes judicial legislation at its worst, is unsupported by even the remotest sanction of the statute, is directly contrary to established principles of insurance and contract law and arbitrarily imposes obligations and duties upon carriers not contracted for; it completely over-rides all legal and statutory safeguards. It, therefore, follows that the award,

cast in its present form, is illegal and void and must be reversed.

Yet the Court below adds to the problem by using expediency as the excuse to further confound a confused finding by the Commissioner. The evidence, as a matter of law, clearly demonstrates that the employee had no loss of hearing with the employer while The State Insurance Fund was on the risk. There are no clauses in its policy of insurance that provide or even contemplate that it would pick up a pre-existing liability of another carrier having already received its premiums for the present risk. Yet the payment of the award is being given to the carrier petitioner herein.

It seems self-evident that if there was no contraction or aggravation, the disease could not be chargeable to that period either against the employer or the carrier covering that period.

The evidence is clear and substantial in the instant case that there was neither a contraction or a related aggravation to the loss of hearing in the period of time that The State Insurance Fund was on the risk (66a, 67a, 92a, 105a, 106a).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively *by the statute,* and the *powers properly to be exercised* by the court are those only which are *expressly conferred* by the said Act.

The present decision is contra to the provisions of Amendment V to the Constitution in that it is a taking away of property unjustly and without due process, Appendix A, *infra,* page 21. We are told to pay for an alleged loss in excess of actuality and without basis in enacted law or decided cases.

We cannot conceive the unjust theory as herein administered. We are being held liable for an entire exposure on only a *7 day coverage* when all the evidence demon-

strates admittedly that the loss of hearing was an occupational fact *before we were even on the risk.*

Furthermore, it was never provided by Congress nor was it ever the Congressional intent to hold us liable under the circumstances herein.

Conclusion

This court can readily see that the questions involved herein are of utmost importance to the industries involved. It is novel and new and never before decided upon by this Court.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

Bernard Katzen,
Counsel for Petitioners.

October 7, 1955.

Appendix A

33 U. S. C. 902 (2)

Section 902, Par. 2:

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U. S. C. 902 (10)

Sec. 902, Par. 10:

" 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment".

33 U. S. C. 903 (A)

Section 903, Par. A:

Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by State Law.

Section 37 of New York Workmen's Compensation Law

Section 37 of the N. Y. W. C. L.:

Whenever used in this article:

1. "Disability" means the state of being disabled from earning full wages at the work at which the employee was last employed.

2. "Disablement" means the act of becoming so disabled as defined in subdivision one.

Article 1, Section 1 of the Constitution of the United States

Constitution of the United States—Article 1, Section 1:

"All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives".

Article 1, Section 8, Par. 18 of the Constitution of the United States

Constitution of the United States—Article 1, Sec. 8, Par. 18:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

Amendment V to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 308
305
346

October Term, 1954

Argued June 8, 1955 Decided July 19, 1955

Docket Nos. 23558
23216
23683

THE TRAVELERS INSURANCE COMPANY and
TODD SHIPYARDS CORPORATION,

Plaintiffs-Appellants,

against

FRANK A. CARDILLO, Deputy Commissioner, Federal Security Agency, Bureau of Employees' Compensation, Second Compensation District, and JOSEPH TROPEA,

Defendants-Appellees.

Appendix B.

IRA S. BUSHEY & SONS, INC.,
Plaintiff-Employer-Appellant,

and

AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
Plaintiff-Insurance Carrier-Appellant,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Plaintiff-Insurance Carrier-Appellant,

and

THE STATE INSURANCE FUND,
Plaintiff-Insurance Carrier-Appellant,

against

THORLEIF JOHANSEN,
Defendant-Claimant-Respondent,

and

FRANK A. CARDILLO, Deputy Commissioner,
Second Compensation District,
Defendant-Resopndent.

Appendix B.

TODD SHIPYARDS CORPORATION, INC.,
Employer-Plaintiff-Appellant,

and

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Insurance Carrier-Plaintiff-Appellant,

against

UNITED STATES DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION, Second District and FRANK A. CARDILLO, as Deputy Commissioner and RAYMOND LEBOWITZ,
Defendants-Appellees.

Before CHASE and MEDINA, Circuit Judges, and RYAN, District Judge.

Appeals from the United States District Court for the Eastern District of New York, Robert A. Inch, Judge.

Plaintiffs appeal from orders granting defendants' motions for summary judgment and denying plaintiffs' cross-motions in actions brought to review orders of various Deputy Commissioners awarding compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 910 *et seq.* Opinions below not reported. Tropea award affirmed; Johansen and Lebowitz awards remanded to the District Court with directions to modify orders entered below.

Galli & Locker, New York City, (Urban S. Mulvehill, of Counsel) for plaintiffs-appellants, The Travelers Insurance Company and Todd Shipyards Corporation.

Appendix B.

Alexander & Ash, New York City (Sidney A. Schwartz, New York City, of counsel), for appellants, Ira S. Bushey & Sons, Inc., and American Mutual Liability Insurance Company.

Joseph Dean Edwards, New York City (Cornelius V. Gallagher and Paul Koch, New York City, on the brief), for Ira S. Bushey & Sons, Inc., Employer, and Hartford Accident & Indemnity Company, Insurance Carrier.

Bernard Katzen, General Attorney of The State Insurance Fund, New York City (Victor Fiddler and George J. Hayes, on the brief), for appellants, Ira S. Bushey & Sons, Inc., and The State Insurance Fund.

Joseph Dean Edwards, New York City (Cornelius V. Gallagher and Paul Koch, New York City, on the brief), for Todd Shipyards Corporation, Inc., Employer, and Massachusetts Bonding & Insurance Company, Insurance Carrier.

Leonard P. Moore, United States Attorney for the Eastern District of New York, Brooklyn, New York (Elliott Kahaner, Assistant United States Attorney) (Stuart Rothman, Solicitor of Labor, Ward E. Boote, Assistant Solicitor, and Herbert P. Miller, Attorney, U. S. Department of Labor, of Counsel), for Appellees Deputy Commissioners.

Irving Israel, New York City, By Leonard Taubenblatt, New York City, for appellees, Tropea, Johansen and Lebowitz.

MEDINA, Circuit Judge.

These are appeals from three separate orders entered by the United States District Court for the Eastern District

of New York granting defendants' motions for summary judgment, dismissing complaints in actions brought pursuant to 33 U. S. C. § 921 to review and set aside as "not in accordance with law" certain compensation orders made by the Deputy Commissioner in each case, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 901 *et seq.*) and denying plaintiffs' cross-motions for summary judgment.

Although the legal questions in all these cases are substantially the same, the factual situations vary somewhat and will be summarized separately.

Tropea Award

The record discloses that claimant Joseph Tropea's history of employment during the period preceding the filing of his claim for compensation was as follows:

"(1) September 3, 1942 to November 16, 1945, employed by Todd Shipyards Corporation.

(2) November 16, 1945 to July 29, 1948, unemployed, except for work at Rockaway Playland.

(3) July 29, 1948 to May 24, 1949, employed by Todd.

(4) May 24, 1949 to December 20, 1950, unemployed.

(5) December 20, 1950 to date, employed by Todd."

and that Todd Shipyards Corporation was insured by the following carriers during the relevant period:

"(1) 1940 to May 1, 1947, Fidelity and Casualty Company of New York.

(2) May 1, 1947 to May 1, 1949, Massachusetts Bonding and Insurance Company.

(3) May 1, 1949 to date, The Travelers Insurance Company."

Appendix B.

Claimant was employed by Todd as a sheet metal worker and throughout the various periods of employment "worked in noisy places, using a chipping gun with a great many chippers and riveters around." He first experienced difficulty with his hearing early in 1953, when he detected a temporary ringing. and in April or May of 1953 he began to notice some impairment in his ability to hear. As a result of the persistence of the impairment, claimant, on September 4, 1953, consulted an ear specialist, who, after examination, advised him that he had a permanent loss of hearing due to his employment and on September 30, 1953, a claim was filed with the Deputy Commissioner for compensation for occupational loss of hearing.

The Deputy Commissioner found that the claimant's occupational exposure resulted in permanent hearing impairment and constituted an injury; that the claim was timely filed from September 4, 1953, the date claimant had knowledge of permanent occupational loss of hearing; that although written notice of injury was not given within thirty days, the employer had knowledge of the injury and was not prejudiced by the lack of written notice; that claimant's average annual earnings at the time of his injury amounted to $4,600; that the period of employment with Todd Shipyards Corporation commencing on December 20, 1950, was the last employment in which claimant was exposed to injurious noises; and that nothing had been paid the claimant as compensation. In view of these findings, the Deputy Commissioner concluded that the employer in the last employment during which the injurious and cumulative effects of the occupational exposure manifested themselves is liable for the payment of compensation; that the Travelers Insurance Company, the carrier covering the employer during such last employment, is liable to discharge the duties and obliga-

tions of the employer in respect of such liability; and that as a result of the injury sustained claimant has a permanent partial disability equivalent to 6% binaural loss of hearing, for which he is entitled to 12 weeks' compensation at the maximum rate of $35.00 a week in the amount of $420.00

The only issue raised on appeal with respect to this claim is the appropriateness of the method used by the Deputy Commissioner in allocating liability to the employer and carrier involved.

Johansen Award

Claimant Thorleif Johansen was employed as follows:

"(1) April 1930-1940 employed by Ira S. Bushey & Sons, Inc. with the exception of a six month period in 1936.

(2) 1940-1942 employed by the United States Navy Yard in Brooklyn.

(3) 1942—date employed by Ira S. Bushey & Sons, Inc. with the exception of a one year vacation in 1946."

During claimant's periods of employment, Ira S. Bushey & Sons, Inc., was insured by the following carriers:

"(1) June 8, 1927 to June 1, 1953 American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company.

(2) June 1, 1953 to September 9, 1953 Hartford Accident and Indemnity Company.

(3) September 9, 1953 to September 16, 1953 The State Insurance Fund."

Appendix B.

Johansen was employed variously as an iron worker, shipfitter and ship carpenter in the repair of vessels and was constantly exposed to loud noises. In December, 1952, claimant noticed recurring episodes of buzzing and ringing in his ears and in January or February, 1953, became aware of a loss of hearing which he thought was of a temporary nature. When no diminution of the impairment was perceived for several months, claimant, on September 16, 1953, went to an ear specialist, who, after examination, informed the claimant that he had a permanent loss of hearing due to his employment. On October 5, 1953, claimant filed a claim with the Deputy Commissioner to recover for such permanent hearing loss.

The Deputy Commissioner found that, as a result of his employment, claimant sustained occupational injury, consisting of permanent binaural impairment of hearing; that the injury arose naturally out of his employment; that although written notice of injury was not given within thirty days, the employer had knowledge of the injury and had not been prejudiced by lack of written notice; that the claim for compensation was timely filed within one year from the date when claimant first had knowledge of a permanent hearing loss due to his employment; that the claimant's average annual earnings at the time of his injury exceeded $2,730.00; and that nothing had been paid to the claimant as compensation. Accordingly, the Deputy Commissioner concluded that Ira S. Bushey & Sons, Inc., the last employer, in whose employment claimant was continuously exposed for eleven years, was liable for payment of compensation; that the insurance carriers who successively covered such liability of the employer during the period of claimant's last employment were jointly, equally and severally responsible for the discharge of the duties and obligations of the last employer in respect of such liability; and that, as a result of the injury sustained, claimant had suffered permanent partial disability equiva-

lent to 13.8% binaural loss of hearing compensable under the Longshoremen's and Harbor Workers' Act at the maximum rate of $35.00 a week for 27.6 weeks, or a total amount of $966.00.

The employer and the three insurance companies involved attack the award on various grounds. All contend that claimant is not entitled to any recovery under the statute in the absence of affirmative proof of impairment of wage earning capacity. Each of the insurance companies attacks the Deputy Commissioner's determination that all the carriers covering the claimant's last period of employment with Ira S. Bushey & Sons, Inc., were jointly, severally and equally liable; but each suggests a different formula which should be applied to these occupational disease compensation cases. Two of the companies assert, in addition, that the claim should be set aside for failure to give appropriate notice of injury and failure to file a claim within the time period specified by the statute.

Lebowitz Award

Claimant Raymond Lebowitz had been employed by Todd Shipyards Corporation as a marine electrician from 1942 to and beyond the time of the filing of this claim for compensation.

During this period of employment Todd was insured by the following carriers:

"(1) February 6, 1942 to May 1, 1947 Fidelity & Casualty Company of New York.

(2) May 1, 1947 to May 1, 1949 Massachusetts Bonding and Insurance Company.

(3) May 1, 1949 to August 22, 1953 Travelers Insurance Company."

Appendix B.

Throughout the time spent working for Todd, claimant was required to work around ships and was exposed to noises caused by riveting, hammering, chiseling and other industrial activities. In January 1953, claimant became aware of intermittent noises and ringing in his ears and on August 22, 1953, consulted an ear specialist who, after an examination, informed claimant that he had a permanent loss of hearing due to his employment. As a result, on September 16, 1953, claimant filed with the Deputy Commissioner to recover compensation for the permanent hearing impairment.

The Deputy Commissioner found that, as a result of his employment, claimant sustained occupational injury, consisting of permanent binaural impairment of hearing; that the injury arose naturally out of his employment; that although written notice of injury was not given within thirty days, the employer had knowledge of the injury and had not been prejudiced by the lack of written notice; that the claim was timely filed within one year from the date claimant first had knowledge of a permanent hearing loss due to his employment; that the claimant's average annual earnings at the time of his injury exceeded $2,730.00; and that nothing had been paid the claimant as compensation. The Deputy Commissioner thereupon concluded that Todd Shipyards Corporation, the last employer, in whose employment claimant was continuously employed for eleven years, was liable for the payment of compensation; that the insurance carriers who successively covered such liability of the employer during the period of claimant's last employment were jointly, equally and severally responsible for the discharge of the duties and obligations of the employer in respect of such liability; and that, as a result of the injury sustained, claimant had suffered permanent partial disability equivalent to a 15% binaural loss

of hearing compensable under the Longshoremen's and Harbor Workers' Act at the maximum rate of $35.00 a week for 30 weeks or a total amount of $1,050.00.

The only carrier on the risk during claimant's period of employment which appealed from the award is the Massachusetts Bonding and Insurance Company, the carrier from May 1, 1947 to May 1, 1949. The issues raised on this appeal are the same as those raised by the carrier-appellants in connection with the Johansen award.

Timeliness of Notice and Claim

Appellants' contentions that the Johansen and Lebowitz claims are barred because they were not filed within one year from the date of the "injury" and because written notice was not given the respective employers within thirty days from that date, are wholly without merit. With regard to the requirement of notice, the Deputy Commissioner made specific findings that the employers had knowledge of the injury and that they were not prejudiced by the failure to give written notice. Under the applicable statutory provision, such findings exempt these claims from the bar which otherwise might exist (33 U. S. C. §912(d)). The attack upon the Deputy Commissioner's findings that the claims were filed within one year from the date of the "injury" is based upon the supposition that, in occupational disease cases, the date of "injury," within the meaning of the applicable statute of limitations, is some date earlier than that upon which the cumulative effects of exposure manifest themselves. In support of the latter contention, reliance is placed upon cases involving "accidental" injury in which a distinction is drawn between the specific date upon which the injury is actually inflicted and the date upon which the extent of the disabling effects of the injury becomes apparent. Although it may well be

that the Congress intended that one injured in an industrial accident occurring at an identifiable time and place who, presumably, could be expected to know that he was hurt, even if, at the time, he was unaware of the extent of the disablement resulting from his injury, should be required to file a claim within one year from the date of the accident, it seems perfectly clear that a different criterion necessarily must have been contemplated in cases of occupational disease. Every claim based upon occupational disease would be barred if the one year limitation period were declared to begin running when contact is first had with the condition causing the disease or when the disease first ensues. At such a time, a potential claimant would have no occasion to realize that there is anything wrong with him, much less that he had suffered damage industrially caused. The Supreme Court has recognized the absurd effects which would result from the application of such a rule in occupational disease cases and has held, in an analogous situation arising under the limitation provisions of the Federal Employer's Liability Act, that an "employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." *Urie* v. *Thompson,* 337 U. S. 163, 170 (1949). Since the fact that the various claims presently before us were filed well within a year of the "date of manifestation" is undisputed, we conclude that they are not barred by the statute of limitations.

Impairment of Earning Capacity

The contention is made that affirmative evidence of a diminution in wages or in wage earning capacity directly attributable to the claimed injury is indispensable to recovery under the Act. It is urged that since the claimants herein were able to continue at their customary jobs, they

had not sustained disabling injuries which are compensable. Appellants realize that, in order to maintain their position, it is incumbent upon them to demonstrate that even in the case of "schedule losses" it must be essential to show specific loss of wages, or that the injuries involved are not properly treated as "schedule losses", under 33 U. S. C. § 908 (c) 13, but should be treated as fitting within the category of "other cases," in which awards are based upon the difference between the average weekly wage before the injury and the claimant's wage earning capacity after the injury, 33 U. S. C. § 908 (c) 21. It is thus argued that "schedule losses" apply only to "accidental" injuries or injuries resulting from "trauma" and do not apply to injuries resulting from occupational disease. It is also asserted that this court, in stating that "schedule losses" were bottomed on a concept of impairment of wage earning capacity (*Iacone* v. *Cardillo,* 208 F. 2d 696 (CA 2, 1953)), impliedly held that affirmative proof of impairment must be introduced by claimant, even in such cases. Neither argument is persuasive. Nowhere in the statute did the Congress limit the applicability of the schedules to injuries resulting from accident or trauma. Little support can be gleaned from the state statutes in effect at the time the Federal Act was passed, for they differed markedly in some respects from the Federal Act. Thus, in 1927, when the Longshoremen's Act was passed, the New York Workmen's Compensation statute, which was used in planning the format of the Federal Act, did not treat recovery for occupational disease with the breadth of view which the Congress later chose to adopt. It is apparent that the Congress, in defining "injury" under the Act to include "occupational disease" as well as "accidental injury", intended that the two should be treated similarly, unless otherwise specified in the Act, or unless the nature of the two kinds of "injury" rendered it impracticable to accord

similar treatment to each. Nothing in the nature of the "schedule losses" specified in 33 U. S. C. § 908 (c) indicates a necessity to treat loss of hearing resulting from accident any differently from loss of hearing resulting from occupational disease. Indeed, were we to hold otherwise, we would be sanctioning a rule under which identical impairments would be given disparate treatment under the Act, *viz.*, one injury would be compensable as a schedule loss if it resulted from accident and the other would not, simply because it arose out of the insidious effects of an occupational disease. This could hardly have been the intention of the Congress.

Having concluded that the statutory schedules apply to "injury" resulting from occupational disease, it remains for us to point out only that, in the case of schedule losses, the Congress has determined that a loss of wage earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment. The situation presented in the *Iacone* case, *supra,* is distinguishable. In that case, the use of the eye was lost long prior to the industrial accident upon which the claim was founded, and, consequently, we stated that "Industrially, claimant lost nothing by the second injury." In effect we held that the Congress did not contemplate compensation for the loss of a previously sightless eye when it made provision for scheduled awards in 33 U. S. C. § 908 (c) (5). In the cases presently before us, there was ample evidence to sustain the Deputy Commissioner's findings of permanent binaural impairment of hearing arising naturally out of the claimant's employment and, consequently, the schedule loss formula provided for in the statute was properly invoked in accordance with the apparent Congressional intent conclusively to fix compensation for permanent partial loss of hearing.

Appendix B.

Allocation of Liability

The most difficult question presented by these cases is not that of a claimant's right to recover but rather that of determining upon whom shall devolve the burden of paying the tariff imposed by this socially desirable legislation. The nature of occupational diseases and the dearth of medical certainty with respect to the time that is required for them to develop and the permanence and extent of the resultant injurious effects at different stages of the diseases' evolution, makes it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences. Realizing this difficulty, and in the absence of a specific legislative provision indicating an appropriate method for allocating liability, the various Deputy Commissioners sought a formula which they believed would be administratively feasible and would at the same time effectuate the beneficial purposes of the act. The method selected was that used in these three cases, namely, holding "the employer in the last employment during which the injurious and cumulative effects of the occupational exposure manifested themselves" principally liable, and holding "the carrier or carriers covering the employer during such last employment jointly, severally and equally responsible for the discharge of the duties and obligations of the last employer in respect of such liability." Until these cases arose, carriers in similar situations had consented to the application of this formula. It is clear, however, that previous administrative practice has, at most, persuasive effect, and that acquiescence in similar cases does not preclude questioning the practice at this time. Moreover, the record discloses that several of the carriers involved here never before consented to the use of this method for allocating liability.

Thus appellants suggest various formulae which, collectively, include almost every alternative approach to the solution of the problem, running the gamut from full scale medical inquiry into all prior employments which may have fostered the development of the disease and attempting to apportion liability to each employer along the line, the carriers covering such employers during the periods in and to which claimants were so exposed, to holding the employer during the employment in which the injurious effects manifested themselves and the carrier with whom the employer carried his insurance at that time. Each of the suggested alternatives has advantages and disadvantages and, in view of the present state of medical knowledge relating to these diseases and the administrative obstacles confronting those charged with the initial responsibility for passing upon these claims, it would be sheer folly to seek or expect to discover a formula devoid of any possibility of inequity or seeming injustice.

But, our problem is not one of choice but rather, primarily, one of legislative interpretation and in the absence of any reference in the statute to the precise point, we must examine the legislative history for such light as it may afford. That the Congress was not unaware of the difficulty that might arise with respect to occupational disease seems clear. During the course of the hearings which preceded the passage of the Act, an employer representative suggested that the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a "last employer" would be liable for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that "last em-

ployment.'"[1] Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered; and it would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that the Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

There remains the question, which carrier or carriers are responsible for the discharge of the duties and obligations of the "last employer" in respect of his principal liability. Here we are frankly groping in the dark. But the conclusion already arrived at with respect to the liability of the employer may fairly be thought to mark the path to be followed here as well. If administrative ease of handling was a consideration of significance in the formulation of the Act with reference to the liability of the employer, then there is small reason to suppose that it was the intention of the Congress to inject into the determination of carrier liability the very same conjectural and unsatisfactory estimates which would have been involved in attempting to apportion liability among employers. Nor can it be argued with any persuasive effect that the Congress, in charging the "last employer" was concluding, as matter of law, that the disability resulted solely, or even primarily, from the exposure during the period of last employment so that it would follow, as a

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[1] Hearing of Committee on the Judiciary of the House of Representatives, on H. R. 9498, 69th Congress, 1st Sess., held April 8, 15, 22, 1926.

natural consequence, that all carriers insuring the "liable" employer during the "last employment" should, in some manner, be required to share responsibility for the employer's liability. There is no basis for attributing so fictional and unrealistic a view to the legislature. Rather, it would seem far more in keeping with the Congressional recognition of the over-riding importance of efficient administration in this area, to conclude that the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the "liable" employer during the claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the "liable" employer. We so hold.

Accordingly, the order entered in connection with the Tropea claim is affirmed and the cases involving the Johansen and Lebowitz claims are remanded to the District Court with directions to modify the respective orders in accordance with the views expressed herein.

Judgment

COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of July one thousand nine hundred and fifty-five.

Present:

Hon. HARRIE B. CHASE,
Hon. HAROLD R. MEDINA,
Circuit Judges,
Hon. SYLVESTER J. RYAN,
District Judge.

IRA S. BUSHEY & SONS, INC.,
Plaintiff-Appellant,

v.

FRANK A. CARDILLO, etc., and THORLIEF JOHANSEN,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is remanded in accordance with the opinion of this Court.

A. Daniel Fusaro,
Clerk

By
Ralph C. Curcio
Deputy Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 465

IRA S. BUSHEY AND SONS, INC., AND THE STATE INSURANCE FUND, INSURANCE CARRIER, PETITIONERS

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, SECOND COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR DEPUTY COMMISSIONER CARDILLO IN OPPOSITION

OPINIONS BELOW

The order of Deputy Commissioner Cardillo awarding compensation to the claimant (R. 9a-12a) is not reported. The opinion of the United States District Court for the Eastern District of New York (R. 30a-33a) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. B, 24-39) is reported at 225 F. 2d 137.

JURISDICTION

The judgment of the Court of Appeals was entered July 19, 1955 (Pet. 40-41). The petition for a writ of certiorari was filed October 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the award of compensation to a claimant under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, for an injury for which compensation is provided by schedule in Section 8 of that Act, must be predicated on impairment of the claimant's present wage-earning capacity.

2. Whether the provision of the Longshoremen's and Harbor Workers' Compensation Act that compensation shall be awarded for "occupational disease" is an unconstitutional delegation of legislative power to the deputy commissioner.

3. Whether it was unlawful to impose sole liability for the award upon the carrier which insured the employer as of the time the claimant discovered that he was suffering from the work-connected occupational disease.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * *

COVERAGE

Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

COMPENSATION FOR DISABILITY

Sec. 8. Compensation for disability shall be paid to the employee as follows:

* * * * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

* * * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance

of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

* * * * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * * *

SUBSTITUTION OF CARRIER FOR EMPLOYER

SEC. 35. In any case where the employer is not a self-insurer, in order that the liability

for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the commission, or any court under this Act shall be jurisdiction of the carrier, and (3) any requirement by a deputy commissioner, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

INSURANCE POLICIES

Sec. 36. (a) Every policy or contract of insurance issued under authority of this Act shall contain (1) a provision to carry out the provisions of section 35, and (2) a provision that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the carrier from payment of compensation for

disability or death sustained by an employee during the life of such policy or contract.

* * * * *

STATEMENT

The claimant, Thorlief Johansen, was employed continuously for eleven years prior to September 16, 1953, by petitioner Ira S. Bushey and Sons, Inc., as an iron worker, shipfitter, and ship carpenter in the repair of vessels (R. 10a).[1] In his work, claimant was constantly exposed to loud and injurious noises; in December, 1952, he experienced recurring ringing and buzzing in his ears, and in late January, 1953, he noticed a slight impairment in his hearing which he believed was temporary (R. 10a-11a). The impairment persisted and increased, and on September 16, 1953, claimant was informed by an ear specialist that he had a permanent loss of hearing as a result of his employment (R. 11a). On October 5, 1955, he filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, with the deputy commissioner, who found that claimant had sustained an "injury, occupational in character * * * equivalent to 13.8 per cent binaural loss of hearing" (R. 11a). There was no evidence of any loss of earning capacity, and there was testimony that claimant was not "industrially disabled" (this being defined as "in any way

[1] Johansen had also been employed by the petitioner-employer from April, 1930, until 1940, with the exception of a six-month period in 1936 (R. 40a).

handicapped" by the impairment, or as under an "incapacity to earn wages") (R. 73a, 96a).

During the period of claimant's employment, the petitioner-employer was covered by three successive insurance carriers. These were the American Policy Holders' Company and/or American Mutual Liability Company, from 1942, to June 1, 1953; Hartford Accident and Indemnity Company from June 1, 1953, to September 9, 1953; and petitioner State Insurance Fund from September 9, 1953, to September 16, 1953. The deputy commissioner awarded claimant compensation of $35 a week for 27.6 weeks, and ordered that the compensation should be paid "jointly, severally and equally" by the three insurance carriers (R. 12a). The employer and all three carriers brought a complaint in the United States District Court for the Eastern District of New York to review the decision of the deputy commissioner (R. 2a-8a). On cross-motions for summary judgment, that court directed judgment for the deputy commissioner (R. 21a-22a). This decision was appealed in a consolidated proceeding with two other cases involving similar circumstances. The United States Court of Appeals for the Second Circuit affirmed the decision of the deputy commissioner that the claimant was entitled to compensation, but reversed his direction that the three carriers be equally liable for the award. The court stated that a partial loss of hearing was covered by the "schedule losses" in Section 8(c) of the Longshoremen's Act and that no proof of an impairment of earning

capacity was necessary for an award of compensation for such an injury (Pet. App. B, 33-35). It ruled further that "the carrier who last insured the 'liable' employer during the claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer" (Pet. App. B, 39).

ARGUMENT

1. The deputy commissioner found that, as a result of the claimant's employment in the repair of vessels and the consequent constant exposure to loud and injurious noises, he sustained an "injury, occupational in character, consisting of permanent binaural impairment of hearing" and that this injury "arose naturally out of such employment" (R. 10a). This finding was fully supported by medical and other testimony and is not disputed by petitioners.

Under the Longshoremen's and Harbor Workers' Compensation Act, the compensation to be paid for a loss of hearing is to be determined by schedule. Section 8 of that Act, 33 U. S. C. 908, provides that:

> Compensation for disability shall be paid to the employee as follows:
>
> * * * * *

> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages * * * and shall be paid to the employee, as follows:
>
> * * * * *
>
> (13) Loss of hearing. Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.
>
> * * * * *
>
> (19) Partial loss or partial loss of use. Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

In the instant case, the deputy commissioner found that the claimant suffered a 13.8 per cent binaural loss of hearing, and accordingly he directed the payment of compensation for 27.6 weeks.

The quoted provisions, it will be noted, make no reference to the impairment of the claimant's earning capacity, nor do they justify a holding that such an impairment must be found before compensation can be awarded. The conclusion is fortified by the explicit provision in subsection (21) of Section 8(c) that in all cases of permanent partial disability, *other than those covered by a specific schedule,* compensation shall be based on diminution of earning capacity. The decision below is supported, moreover, by the uniform interpretation of similar

schedules in state workmen's compensation law.[2] Thus, a leading commentator has stated that payments under scheduled losses "are not dependent on actual wage loss" and that "[e]vidence that claimant has been regularly employed at greater earnings than before is completely immaterial." 2 Larson, *Workmen's Compensation*, § 58.10. This does not mean, of course, that the schedules represent a rejection of the principle that workmen's compensation is directed at the impairment of earning capacity. On the contrary, what it does mean is that in these instances the injury's "effect on earning capacity is a conclusively presumed one." 2 Larson, *Workmen's Compensation*, § 58.10.[3]

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[2] See, *e.g.*, *Bednar* v. *Ingersoll Rand Co.*, 279 N.Y. 80, 17 N.E. 2d 777; *Slawinski* v. *Williams*, 273 App. Div. 826, 76 N.Y.S. 2d 888, affirmed, 298 N.Y. 546, 81 N.E. 2d 93 (decisions under the New York law have been held by this Court to be particularly relevant to the interpretation of the Longshoremen's Act inasmuch as that Act was based on the New York law, see *Lawson* v *Suwannee Fruit and S.S. Co.*, 336 U.S. 198, 205); *Green Bay Drop Forge Co.* v. *Industrial Commission*, 265 Wisc. 38, 60 N.W. 2d 409; *Shaw* v. *Rosenthal*, 112 Ind. App. 468, 42 N.E. 2d 383; *Mudge Oil Co.* v. *Wagnon*, 193 Okla. 466, 145 P.2d 185. This rule has been applied even in some cases where it has meant that the claimant would be restricted to the scheduled compensation although his actual loss of earning capacity had been far greater. See *e.g.*, *Lente* v. *Lucci*, 275 Pa. 217, 119 A. 132; *Bronson* v. *City of Fremont*, 143 Nebr. 281, 9 N.W. 2d 218.

[3] The fact that in a given case there has been no demonstrated loss of earning power is not only immaterial in the face of such a conclusive presumption, but it does not even render the presumption anomalous. For the presumption may well reflect a legislative determination that any impairment of a physical function will threaten the employee's future earning power, either by reducing the number of his useful

It was also contended below that the "schedule losses" in Section 8(c) (1)-(20) are only intended to apply to cases of "accidental injury" and that the determination of compensation for "occupational disease" falls within the "other cases" provision of Section 8(c)(21). As pointed out by the court of appeals, there is absolutely no basis in the statute or in the legislative history for such a contention. Compensation under the Act is payable "if the disability or death results from an *injury* occurring upon the navigable waters of the United States," Section 3(a), 33 U. S. C. 903(a) (italics added), and "injury" is defined as either "accidental injury" or "occupational disease." Section 2(2), 33 U. S. C. 902(2). As the court below said, "Nothing in the nature of the 'schedule losses' * * * indicates a necessity to treat loss of hearing resulting from accident any differently from loss of hearing resulting from occupational disease" (Pet. App., p. 35). To distinguish the two would create an anomalous distinction between workers with identical work-connected disabilities solely on a basis not sanctioned by the statute.

2. Petitioners also contend that the Longshoremen's and Harbor Workers' Compensation Act is unconstitutional insofar as it directs the award of compensation for disability resulting from "occupational disease." The argument is that in leaving it "to the deputy Commissioners to determine what an occupational disease is; when the date of dis-

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years, or by lessening his chances of obtaining new employment. That the employee's capacity to earn wages in the future may be a factor in determining compensation is indicated by Section 8(h), 33 U.S.C. 908(h).

ablement took effect and which employer shall be liable therefor," Congress has unlawfully delegated its legislative powers without providing "rules of conduct or guides." (Pet. 14.) In support, petitioners cite *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, a case in which this Court sustained, against a contention similar to that made by petitioners here, an Ohio statute delegating to an administrative body the power to license motion pictures. While the validity of that decision with reference to that subject matter is now extremely doubtful, see *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502, the Court's statement concerning delegations of legislative power remains pertinent. The Court declared (236 U. S. at 245-246) that statutory terms,

> like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. * * * If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.

The challenged terms of the Longshoremen's Act get precision from "the sense and experience," not only of the public, but of the boards and commis-

sions which administer workmen's compensation throughout the nation.

Petitioners object that no definition of "occupational disease" is provided by Congress. But the federal courts have not found the term to be so lacking in specificity that its application is impossible or conjectural. On the contrary, for twenty-eight years, there has been general agreement as to its meaning. See, *e. g.*, *Grain Handling Co.* v. *Sweeney*, 102 F. 2d 464 (C. A. 2) (in order to recover for an occupational disease "a workman must be exposed to hazards greater than those involved in ordinary living, and the disease must arise from one of these"). Indeed, this Court has held that recovery may be had for "occupational disease" under the Federal Employers' Liability Act, which does not even contain the term. "Occupational disease," it has concluded, is encompassed by the term "injury." *Urie* v. *Thompson*, 337 U. S. 163.[4]

Petitioners also object that the Deputy Commissioner is given broad authority to determine the date of disablement. Congress need not establish detailed criteria before entrusting such a determination to an administrative body. It is notable that in *Urie* v. *Thompson*, 337 U. S. 163, this Court declared what the controlling date is for an occupa-

[4] Petitioners have pointed to the New York law as one providing the necessary guidance for determining the existence of an "occupational disease." But that Act, since 1935, has provided for compensation for disabilities resulting from "[a]ny and all occupational diseases," without further definition. N. Y. Workmen's Compensation Law, Section 3 (2) (28).

tional disease which does not immediately manifest itself.[5]

Petitioners also urge that it is improper to leave it to the deputy commissioners to determine which employer shall be liable. But it appears clear, as held below, that when Congress rejected a proposal for apportionment among successive employers, it must have intended to impose liability upon the last employer. See discussion, *infra*, point 3. The court of appeals has directed entry of an appropriate order on the basis of this interpretation of the statute. Certainly, this aspect of the case raises no issue as to delegation of powers.

3. The deputy commissioner found that the claimant's loss of hearing resulted from his continual exposure to loud and injurious noises throughout the eleven years that he was working for the petitioner-employer. During this time, the petitioner-employer was insured by three successive carriers. The deputy commissioner directed that all three carriers should be equally liable for the payment of compensation. The court of appeals, however, ruled that under the

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[5] Again, petitioners attempt to find greater certainty in New York law which, they say, fixes "date of disablement as fixed by the Industrial Board." Yet, the only reference in that law which can serve as a guide for the fixing of that date is that "[t]he disablement of an employee resulting from an occupational disease * * * shall be treated as the happening of an accident." N. Y. Workmen's Compensation Law, Section 38. The date of that disablement is left to the Industrial Board with no other guide than the statutory definition of disablement, which is no more certain of application than is the definition in the Longshoremen's Act.

Longshoremen's Act the carrier at the time disability is established should be held responsible for the entire liability of the employer. Upon reconsideration, we are persuaded that this construction conforms to the principles of the Longshoremen's Act and of similar workmen's compensation legislation, and that its adoption by the court below was correct.

In the first place, it seems clear that the Longshoremen's Act contemplates that when disability results from an occupational disease incurred in the claimant's work for several successive employers, the last such employer shall be wholly liable for the disability. That this was the view of Congress is evidenced by its rejection of a proposal that compensation in such cases should be apportioned among the various employers. This rejection took place in the face of an acknowledgment that, absent such a provision, the "last employer" would be liable for the entire award (Pet. App. B, 37-38).[6] For Congress the primary consideration

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[6] See Hearing of House Committee on the Judiciary on H.R. 9498, 69th Cong., 1st Sess. (p. 74):

> Mr. Brown (representing employers): Yes, that is our contention. It may have accumulated, and may not have been attributable at all to the employment by the last employer. The point that we make is that we want some fair proposition inserted in there that would protect that last employer. *Leaving it as it is now, if a disability occurs during his employment, that is enough to put upon the employer at the time the disability occurred the entire expense;* and you are charging an industry with the expense of a hazard which the industry has not incurred. [Italics added]
>
> Mr. Bowling (Congressman): Why not? It is a rule

was that the administration of the Act should not be delayed, complicated, or rendered conjectural by requiring the deputy commissioner to ascertain the degree to which the claimant's work with each successive employer was responsible for his disability. Certainly, there is no reason to believe that Congress presumed that such a disability would be the result wholly of the last employment. It was doubtless aware that the burden of the award would fall disproportionately upon one employer in a given case, yet chose that result as a matter of administrative necessity in the belief that in the long run the burdens would be roughly apportioned among all employers.

Congress did not address itself directly to this question in relation to the situation of successive insurers. Yet, to apportion compensation among the carriers of a single employer would introduce the same problem—with its attendant delays, complexities, and conjectures—which was avoided by

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of employment and the painters are coming in and going out all the time. Why not provide that the present employer shall bear the burden of the man who is suddenly seized with this disease, which every one knows is incident to his employment, but which has its culmination suddenly.

John B. Andrews, Secretary of the American Association for Labor Legislation, stated in a brief submitted to the Committee (p. 115) that the proposed change to charge the last employer only with a "proportion" of the loss "if adopted would be the cause of endless controversy." The witness further stated that "the employer in all cases takes workmen as he finds them and the principal throughout is the same whether the following disability be on account of accident or occupational disease."

H.R. 9498 was the House bill substantially equivalent to S. 3170, which became the Longshoremen's Act.

Congress's decision as to successive employers. Thus, the construction placed upon the statute by the court below implements the dominant Congressional purpose.[7]

In the second place, the rule holding the "last carrier" wholly liable conforms to the general view of disability taken under federal compensation statutes. While it is recognized that disability may be the culmination of a long-developing condition, the disability itself is considered to have come into existence by reason of an "injury" at a specific date, and, if the disability has been occasioned by conditions to which the claimant is still exposed, the employer at that date—and consequently his carrier—is liable. For example, responsibility for a disability may be imposed even though it is clear that the employment was not the sole factor in causing the disability. Thus, the employer is liable for a disability arising out of the employment even though it would not have occurred except for a pre-existing infirmity of the employee. See, *e. g.*, *Friend* v. *Britton*, 220 F. 2d 820 (C.A. D.C.), *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715 (C.A. D.C.), certiorari denied, 290 U. S.

[7] The fact that Congress did not specifically deal with, or consider, this problem does not, of course, prevent its resolution by those charged with the enforcement of the statute. Congress directed that compensation orders should be binding on the carrier as on the employer, Section 35, 33 U.S.C. 935. In carrying out this mandate, it must be determined against which carrier the order should run, and the question cannot be avoided on the ground that the intention of Congress is not expressly stated. Cf. *United States* v. *Klinger*, 199 F. 2d 645, 648 (C.A. 2).

637. Moreover, when the disability results from a slowly developing occupational disease, the symptoms of which are not immediately apparent, the date of the "injury" is assumed to be the date when the condition manifests itself. *Urie* v. *Thompson*, 337 U. S. 163, 170. In this case, that date was September 16, 1953, the first time that the claimant learned he had a permanent disability arising from his employment. The petitioner-carrier had assumed coverage seven days before, and during that time the claimant had continued to work under the conditions which had resulted in, and were increasing, his hearing impairment.

The ruling of the court below holding the last carrier liable for the entire compensation award in these circumstances is the law of several states by statute. See, *e. g.*, *Durham Mfg. Co.* v. *Hutchins*, 115 Ind. App. 479, 58 N. E. 2d 444; *Employers' Liability Assurance Corp.* v. *Merritt*, 117 Ind. App. 697, 75 N. E. 2d 803 (insurer on risk seven days out of twenty-eight years); *Casson* v. *Graham Paige Motor Co.*, 312 Mich. 452, 20 N. W. 2d 270 (insurer on risk three days); *Bye* v. *Interstate Granite Co.*, 230 N. C. 334, 53 S. E. 2d 274; *Gaydosh* v. *Richmond Radiator Co.*, 164 Pa. Super. 154, 63 A. 2d 502; *Pacific Employers Insurance Co.* v. *Industrial Commission*, 108 Utah 123, 157 P. 2d 800. And the New York courts have considered this result required by the provision that "[t]he disablement of an employee resulting from an occupational disease * * * shall be treated as the happening of an accident" (N. Y. Workmen's Com-

pensation Law, Section 38), notwithstanding the fact that the New York law permits apportionment between successive employers (N. Y. Workmen's Compensation Law, Section 44). *Lanzetta* v. *Allied Decorating Co.*, 261 App. Div. 861, 24 N. Y. S. 2d 829 (3d Dep't), affirmed, 287 N. Y. 570, 38 N. E. 2d 230; *Trimboli* v. *Ford Instrument Co.*, 271 App. Div, 854, 66 N. Y. S. 2d 39 (3d Dep't) (insurer on risk one day); *Russo* v. *Despatch Shops, Inc.*, 280 App. Div. 1008, 116 N. Y. S. 2d 788 (3d Dep't) (a deafness case).[8] Moreover, the courts of at least four states have reached the same conclusion in the absence of a guiding statutory provision. *Donahue's Case*, 292 Mass. 329, 198 N. E. 149; *Fitzpatrick's Case*, 331 Mass. 298, 118 N. E. 2d 774; *King* v. *St. Louis Steel Casting Co.*, 353 Mo. 400, 182 S. W. 2d 560; *Textileather Corp.* v. *Great American Indemnity Co.*, 108 N. J. L. 121, 156 A. 840 (insurer on risk twenty days); *Employers Mutual Liability Insurance Co.* v. *McCormick*, 195 Wisc. 410, 217 N. W. 738.[9]

The carrier argues that the ruling of the court below deprived it "of its constitutional rights under its contract of insurance." But even assuming

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[8] As a reading of the cited New York cases indicates, this petitioner-carrier has benefitted, in individual cases, from the "last-carrier" rule as applied by the New York courts.

[9] Most of the states with specific statutory provisions provide that the carrier at the time of the last exposure is liable; in most of those without such provisions, the carrier at the time of disability has been held liable. Inasmuch as in the instant case the claimant was still exposed to the injurious conditions at the time his disability was ascertained, this distinction is immaterial here.

(notwithstanding the provisions of Sections 35 and 36, *supra*, pp. 6-7) that the policy could alter the liability imposed on the carrier by the Longshoremen's Act, this question cannot be raised. The policy is not in the record before this Court, and, indeed, does not appear to have been introduced below.[10] The only question here is the correctness of the decision of the court below as an interpreta-

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[10] Petitioners state (Pet. 15):

> No extended argument is required to show that the respective insurance carriers assumed their liability under express contract in which the time of commencement, as well as termination of liability, is clearly set out. It is elementary that by such policy of insurance, absent legislation to the contrary, the carrier assumes only such liability as accrues during its coverage period. The policy does not provide for the assumption of liability previously incurred, nor does it provide for the shifting of liability to its successor insurance carrier for liability accumulated during its own policy period.

This contention begs the question presented. In substance, it is nothing more than an assertion that a policy of insurance is entered upon, and generally provides that it will terminate upon, specific dates. The question in this case is whether the liability accrued (not whether the disabling condition began) within those dates, and that is the question answered by the ruling of the court below.

Moreover, if petitioners mean to suggest that this Court may assume that no policy is consistent with the imposition of such liability as was found by the court below, then we submit that this is simply not so. For example, the "Standard Provisions for Workmen's Compensation and Employers' Liability Policies," drawn by the National Council on Compensation Insurance, an organization composed of more than one hundred fifty compensation insurers, see Judkins, *National Associations of the United States* (U.S. Dep't of Commerce, 1949), p. 400, contains the following: "This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by ex-

tion of the Longshoremen's Act. This decision accords with the purposes of Congress in adopting the Act, with the view of disability taken under federal compensation laws generally, and with the workmen's compensation law of numerous states. It facilitates the expeditious determination of claims under the Longshoremen's Act, and also permits the insurers themselves to calculate their potential liability with greater certainty. There is no conflict of decision.

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posure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period." The memorandum accompanying the release of these provisions states that this "provides that in a disease case the company covering the insured at the time of the last injurious exposure of the employee in the employment of the insured is the company liable," and that "this statement of coverage follows *the generally accepted and recognized practice of the companies in handling occupational disease cases under the workmen's compensation laws.*" National Council on Compensation Insurance, *Workmen's Compensation and Employers' Liability Insurance Policy and Endorsement Forms* (Oct. 1, 1954), p. 3 (italics added).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1955.

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HAROLD B. WILLEY,

In the

Supreme Court of the United States

October Term, 1955

No. 465

Ira S. Bushey & Sons, Inc., Employer, and The State Insurance Fund, Insurance Carrier,

Petitioners,

—v.—

Frank A. Cardillo, Deputy Commissioner, Second Compensation District, Thorleif Johansen, Claimant, American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company and Hartford Accident & Indemnity Company, Insurance Carriers,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, IRA S. BUSHEY & SONS, INC., AND AMERICAN POLICYHOLDERS INSURANCE COMPANY AND/OR AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN OPPOSITION

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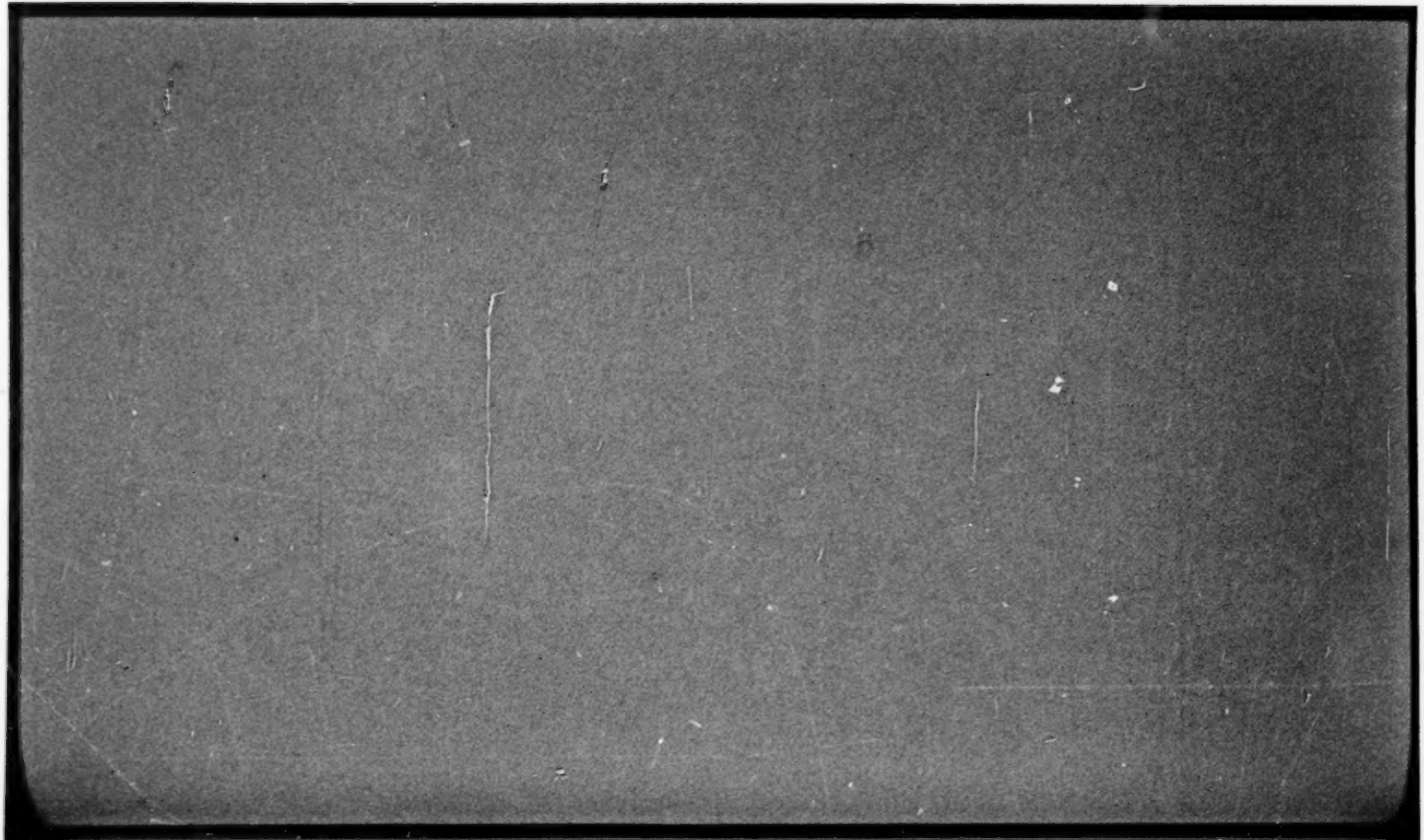

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

IRA S. BUSHEY & SONS, INC., Employer, and THE STATE INSURANCE FUND, Insurance Carrier,

Petitioners,

—v.—

FRANK A. CARDILLO, Deputy Commissioner, Second Compensation District, THORLEIF JOHANSEN, Claimant, AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, Insurance Carriers,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, IRA S. BUSHEY & SONS, INC., AND AMERICAN POLICYHOLDERS INSURANCE COMPANY AND/OR AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is unreported. It is found at pages 30a to 33a of the Record in the Court below. The opinion of the United States Court of Appeals for the Second Circuit is reported at 225 F. 2d 137.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

The petitioner has set forth 3 questions for consideration of the Court. The respondents who are submitting this brief in opposition to the petition have no quarrel with the first 2 questions presented. They do take issue with the propriety of Question 3. It will be shown hereinafter that the petitioner (a) raised no question of constitutionality in the Courts below, (b) presented no proof on that question and (c) that the decisions of the Courts below project no question of constitutionality.

Statute Involved

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. §901 *et seq.*) are set forth in the Petition, Appendix A., pages 20-21.

Statement

For all practical purposes the outline of the facts set forth by the petitioner is correct. The petitioner, State Insurance Fund, has stated in its petition that the testimony of the claimant's (Johansen's) doctor was that the hearing loss existed prior to the State Insurance Fund becoming

the insurer of Ira S. Bushey & Sons, Inc. We think the entire medical proof in this record is much more fairly evaluated by Medina, *C.J.*, writing for an unanimous Court below, in the following excerpt from the decision of said Court (p. 144 of 225 F. 2d):

> "The nature of occupational diseases and the dearth of medical certainty with respect to the time that is required for them to develop and the permanence and extent of the resultant injurious effects at different stages of the diseases' evolution, make it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences."

Argument

The office of this brief is to demonstrate to the Court that no constitutional question is projected by Reason III (pp. 14-19 of Petition). Reasons I and II (pp. 5-14 of Petition) concern themselves with the construction of the statute here involved in so far as it has been held that the compensation claim is compensable.

The petitioner has not shown any conflict of decision respecting that subject because the instant decision is the only appellate decision dealing with the particular Act here involved.

Other than having stated in conclusionary language that questions 1 and 2 are important questions of law for this Court to determine, the petitioner, State Insurance Fund, has not shown factually how this is so.

Having failed to factually demonstrate that any of the considerations, set forth in Rule 19 of this Court, exist in

this matter, the petitioner, State Insurance Fund, seeks, in its argument respecting the apportionment of liability among the insurance carriers, involved in this matter (Reason III, pp. 14-19 of Petition), to inject a constitutional question into the case. It attempts to do this by using the general and all embracing language that the decision below "is an invasion of the right to private property, the cancellation and annulment of the right to contract and is not only illegal *per se* but unconstitutional."

Well, to begin with, the petitioner, State Insurance Fund, never raised any constitutional questions in either of the Courts below.

Second, the Court below neither cancelled nor annulled its *right* to contract.

Third, the Court below did not invade its right to private property. There was no *property* which was involved or invaded. The Court below merely construed the Act here involved to hold the "last employer" liable (which was Ira S. Bushey & Sons, for whom the claimant worked *continuously* for 11 years) and by a parity of reasoning held the insurance carrier liable who last insured that "liable" employer. In arriving at that conclusion the Court said (p. 145 of 225 F. 2d):

> "If administrative ease of handling was a consideration of significance in the formulation of the Act with reference to the liability of the employer, then there is small reason to suppose that it was the intention of the Congress to inject into the determination of carrier liability the very same conjectural and unsatisfactory estimates which would have been involved in attempting to apportion liability among employers."

* * * * *

> "* * * Rather, it would seem far more in keeping with the Congressional recognition of the over-riding importance of efficient administration in this area, to conclude that the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the 'liable' employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer. We so hold."

The Court below never violated the express provisions of the insurance contract. *The insurance contract was never before the Court below, the District Court, or the administrative tribunal.*

Had it been before any of those tribunals, it would have made no difference in this matter. The tribunals were called upon to *construe and interpret the Act here involved*, not an insurance contract which was never before them. The administrative tribunal and the Courts below were, *inter alia*, called upon to determine what the Congress intended with respect to a determination of carrier liability where the statute was silent on that subject.

The Court below, we submit, reasoned properly as to Congressional intention respecting carrier liability.

The petitioner, State Insurance Fund, would have this Court believe that the result as to carrier liability, which the Court below arrived at, is bizarre and completely unheard of. Completely overlooked, and we assume inadvertently, is that the N. Y. Workmen's Compensation Act, upon which the Act here involved was concededly modeled, is entirely silent as to carrier responsibility where there is

(a) *one* employer, in whose employment the claimant is exposed to an occupational disease, and (b) several carriers covering said employer. Administrative practice under the New York statute, which, we submit, should reinforce the decision of the Court below (*Lawson* v. *Suwanee Fruit & Steamship Co.*, 336 U. S. 198, 205, 69 S. Ct. 503, 506), results in the carrier who last insured the employer in a *one* employer case being held solely liable.

Clarke v. *Rochester Folding Box Co.*, 283 App. Div. 1126;
Russo v. *Despatch Shops, Inc.*, 280 App. Div. 1008 (an occupational loss of hearing case);
Lane v. *Daystrom Corporation*, 276 App. Div. 247;
Lanzetta v. *Allied Decorating Co.*, 287 N. Y. 570;
Trimboli v. *Ford Instrument Co.*, 271 App. Div. 854.

The only obligation which the petitioner, State Insurance Fund, had under its policy, which has never been before any tribunal for construction and which, as has been stated heretofore, plays no part in this case, is to pay promptly to any person entitled thereto the amount awarded to him under the compensation law. There is no provision in its policy, which is the standard form of policy, which remotely refers to other carriers who might have insured the particular risk before State Insurance Fund wrote its policy.

Placed in a crucible of analysis, the whole argument State Insurance Fund makes on the subject of carrier liability is that the Court below was wrong in its holding. To make it attractive to this Court for certiorari purposes, it dresses up its argument under Reason III with mystical raiments of constitutionality. Denuded of its unbecoming and inappropriate garb, petitioners' straw man falls because of legal malnutrition.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied to which end this brief is

Respectfully submitted,

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November 9, 1955

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NOV 14 19
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 465

IRA S. BUSHEY & SONS, INC., Employer and THE STATE INSURANCE FUND, Insurance Carrier,

Petitioners,

v.

FRANK A. CARDILLO, Deputy Commissioner, Second Compensation District, THORLEIF JOHANSEN, Claimant, AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, Insurance Carriers,

Respondents.

IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

The opinion of the District Court, printed in the Record of the court below, at pages 30a-33a, is unreported. The opinion of the United States Court of Appeals for the Second Circuit, is reported in 225 Fed. Reporter 2nd 137. Also appears in Appendix B annexed to the Petition at pages 24-39 incl.

Jurisdiction

Judgment of the United States Court of Appeals for the Second Circuit was entered on July 19, 1955, Appendix C, pages 40-41 incl. Jurisdiction of this Court is invoked by Petitioner, State Insurance Fund. under U.S.C. 1254 (1); the Statute involved is the Longshoremen's and Harbor Worker's Compensation Act 33 U. S. C. Sections 901, *et seq.*

Question Presented in Opposition

1. Whether, under the Longshoremen's and Harbor Worker's Compensation Act the compensation carrier, the State Insurance Fund, which last insured the employer, was properly held solely responsible for the employer's discharge of duties and obligations under the said act?

Statute Involved

The statutory provisions involved are in the Longshoremen's and Harbor Worker's Compensation Act of March 4, 1927, 44 Stat 1424, 33 U.S.C. 902 Pars. 2, 10; 33 U.S.C. 903 (a); 908 (c) 13; 908 (c); 21, 33 U.S.C. 935-938 incl.

Statement

Although the employer, Ira S. Bushey & Sons, Inc., is named by the State Insurance Fund as a co-petitioner, it is, in fact, merely a formal but not an actual applicant herein. This is because the employer (as distinguished from its successive insurance carriers) does not deny its liability to the employee, Thorleif Johansen. The question whether the award determining such liability should be based upon Section 908(c) 13, by way of a schedule award or 908 (c) 21, providing for a non-schedule award, as de-

termined on the appeal to the United States Court of Appeals does not survive for further review by the United States Supreme Court either on appeal or by way of Certiorari.

Further: the question whether the liability for the payment of any award made to the respondent, Thorleif Johansen, should be laid solely upon the State Insurance Fund, the last insurance carrier, or apportioned among the several insurance carriers or placed "jointly, severally and equally" upon the successive insurance carriers as set out in the Deputy Commissioner's award, does not present a reviewable issue, as contended by petitioner, State Insurance Fund.

This is the position taken herein by the Hartford Accident & Indemnity Company, one of the several successive insurers of the employer vis-a-vis the State Insurance Fund, the actual petitioner on this application.

Statement of Facts

There is no dispute as to the essential facts in this case. Claimant, Thorleif Johansen, was, with the exception of two periods, not material herein, an employee of Ira S. Bushey & Sons, Inc., from April, 1930 to the date of the award. He was employed as an iron worker, ship fitter and ship carpenter, in the repair of vessels. In the course of his employment he was continuously exposed to loud and excessive noises. In December, 1952 he first noticed recurrent episodes of buzzing and ringing in his ears. In 1953 he became aware of a loss of hearing, which, subsequently, he was informed by an ear specialist, was permanent and was due to his employment. On October 5, 1953 he filed a claim for compensation benefits under the Longshoremen's and Harbor Worker's Compensation Act and subsequently a schedule award for permanent partial

disability, under Section 905 (c) 13, equivalent to 13.8% binaural loss of hearing for 27.6 weeks at the maximum rate of $35.00 per week was made to him.

The award was made by the Deputy Commissioner against Ira S. Bushey & Sons, Inc., the employer, and its three successive insurance carriers. The carriers were held "jointly, severally and equally liable". The decision of the Deputy Commissioner thus awarding compensation was in all respects affirmed on appeal to the United States District Court, Eastern District of New York (District Judge Inch). On further appeal to the United States District Court of Appeals, the Order of Affirmance entered in the District Court was reversed and the matter remanded to the District Court with directions to modify the Order in the instant and the companion case (claim of *Todd Shipyards* v. *Raymond Lebowitz*), by holding the State Insurance Fund "last carrier" solely responsible, together with the employer, and discharging the Hartford Accident & Indemnity Company and another prior insurance carrier from liability.

ARGUMENT

The State Insurance Fund, referred to as "last carrier", was properly held solely responsible for the employer's discharge of duties and obligations under the Longshoremen's and Harbor Worker's Compensation Act.

In arguing for the issuance of a writ of certiorari, the State Insurance Fund contends that the decision of the Court of Appeals, discharging the earlier insurance carriers and holding it as the "last carrier" solely liable for the payment of the entire award, constituted an illegal interference with the contractual liability existing between the parties. That this is erroneous is readily shown.

Petitioner correctly states that its liability for the employer's discharge of the employer's obligation to its employees under the Longshoremen's and Harbor Worker's Compensation Act is determined by the period fixed in the contract. Thus, as to liabilities actually incurred and for which claim has already been made prior to the inception of the petitioner's policy, petitioner could not be held responsible. This is clearly the contracted responsibility of the insurance carrier on the risk at the time when proceedings to establish such liability were initiated. But when a disability develops gradually, within the coverage period of successive insurers and has not been brought into the field of controversy previous to the effective date of the last insurance carrier's policy, the rule is otherwise. This is so, even where the disabling condition first manifests itself after the inception of the last carrier's policy. Absent either a specific provision in the insurance contract or express statutory mandate, such previously existing liability is not excluded from the coverage afforded by the successor insurance company's policy. What the petitioner herein, State Insurance Fund, really seeks is to rewrite the statute as well as its policy and to exclude from coverage all pre-existing disability for which no claim for compensation benefits was made until after the insurance policy of the State Insurance Fund first became effective.

We are not dealing here with an ordinary contract of insurance. In such case the law and public policy grants to the contracting parties great latitude of operation. We are dealing here with an insurance policy framed to meet the express provisions of the statute, namely substitution of the insurance carrier for the employer (Section 936-938). The statute provides, merely for security for the payment of the compensation benefits awarded the injured employee, but no change, modification or lessening of the employer's liability to his employee is contemplated or permitted. Therefore, precisely as pre-existing disease or infirmity

of the employee does not disqualify a claim from "arising out of and in the course of the employment" requirement, if the employment aggravated the disability for which compensation is sought, so also liability attaches to the policy of the insurance carrier in force when the claim for such benefits is first made.

See:

Pittstown Stevedore Corp. v. *Willard,* 92 F. Supp. 89;

Brown-Pacific Marvin Co. v. *Cardillo,* 91 F. Supp. 968.

Again, petitioner complains that to place the entire compensation award to the injured employee upon the last carrier instead of apportioning the same among previous insurance carriers, results in hardship and inequity. Here again petitioner asks the court to provide for the distribution of the loss where the statute, under which the liability arises, is itself silent as to such relief. While in individual cases an inequity may result, this is insufficient reaon for intervention by the court and a rewriting of express statutory enactment as well as over-riding the public policy written into the law by the Congress and for which no independent provision is made in the insurance policy itself. A brief survey of insurance law, particularly that relating to workmen's compensation, will show clearly that what petitioner is seeking represents, at best, a very recent innovation, adopted by a few individual states under statutory provisions and generally limited to claims arising under so called "occupational disease". In most instances the courts will not inquire as to the time when the underlying condition which now has developed into an actual justicable controversy, first arose.

It may, therefore, be broadly said that in the field of workmen's compensation law, precisely as in all other fields of legal liability, the courts regard only the imme-

diate and not the remote cause and lay responsibility for compensating such ensuing injury or damage accordingly. Larsen, in his work on "Workmen's Compensation Law, Section 95.30, *Apportionment Between Insurers*", found the rule requiring a single insurance carrier to assume the entire cost of any single injury, harsh. Nevertheless, the learned author points out that, absent successive "accidents", one occurring prior to the assumption of the risk and one during the risk period of the last carrier, imposing the entire loss on such last carrier was, nevertheless, in conformity with general law. Procedure, apportioning liability for a progressively developing condition between successive carriers, unless directly provided for in the Compensation Act, must be found, if at all, under general law and established by separate and independent proceedings.

Here the petitioner complains that the existing statute has not provided for such procedure; that the Court of Appeals has recognized and given force to this lack of statutory authority. It now asks, that on final review this be written into both the statute and the insurance contract by this court. Merely to state the proposition is to show why it should be rejected.

The Court of Appeals clearly recognized this. In the course of its opinion the court said:

> "During the course of the hearings which preceded the passage of the Act, an employer representative suggested that the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a "last employer" would be liable for the full amount recoverable, even if the length of employemnt was so slight that, medically, the injury would, in all prob-

> ability, not be attributable to that "last employment".[1] Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered; and it would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that the Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

From this premise the court below correctly arrived at the conclusion that the statutory provisions permitting the employer immunity in cases where the employer secured proper and sufficient insurance, should be operative in like manner. Precisely as distribution of the primary liability for the payment of the award by *successive employers* was rejected by the Congress, so the court found that distribution of the secondary liability of insurance carriers among *successive insurers* should be rejected. In so doing the provisions of the statute imposing liability and providing security for the payment thereof, are brought into harmonious consistency.

The State Insurance Fund seeks to break this established consistency and in its place provide for a different rule of liability in favor of successive insurance carriers from that which the Congress expressly rejected in the case of successive employers. It requires no extensive argument that if such distinction between the liabilities of successive

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[1] "Hearing of Committee on the Judiciary of the House of Representatives, on H.R."

employers and successive carriers should be brought into existence, it is for the Congress to do so by appropriate amendment of the statute. That this court has always refused to legislate is firmly established.

It follows, therefore, that the argument made by the State Insurance Fund, the last carrier herein, for a modification of the Longshoremen's and Harbor Worker's Compensation Act and the adjustment of its policy coverage accordingly is fallacious and the petition for the issuance of a certiorari, based thereon should be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

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Of Counsel.

NOV 14 1955
HAROLD B. WILLEY,

IN THE

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OCTOBER TERM, 1955

No. 465

IRA S. BUSHEY & SONS, INC., Employer and THE STATE INSURANCE FUND, Insurance Carrier,
Petitioners,

v.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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Petitioners,

v.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondent prays that the petition for a writ of certiorari to review the mandate of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 19, 1955 be denied.

Statement of Facts

On September 16, 1953 and for 11 years prior thereto claimant, Thorleif Johansen was in the continuous employ of the employer, Ira S. Bushey & Sons, Inc. at Brooklyn, New York in the State of New York, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer, Ira S. Bushey & Sons, Inc. for the payment of compensation under the said Act was insured by three successive insurance carriers:

(1) American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company—June 8, 1927 to June 1, 1953.

(2) Hartford Accident and Indemnity Company—June 1, 1953 to September 9, 1953.

(3) The State Insurance Fund—September 9, 1953 to September 16, 1953.

During the said period of continuous employment with the employer herein claimant performed service as an ironworker, shipfitter and ship carpenter in the repair of vessels and was constantly exposed to loud and injurious noises; that as a result of such employment and exposure, claimant sustained injury, occupational in character, consisting of permanent binaural impairment of hearing; that the said injury arose naturally out of such employment, that the claim for compensation was timely filed within one year from the date when claimant first had knowledge of a permanent hearing loss due to his employment, that the claimant's average annual earnings at the

time of his injury exceeded $2730.00; and that nothing had been paid to the claimant as compensation. Accordingly, the Deputy Commissioner concluded that Ira S. Bushey & Sons, Inc., the last employer, in whose employment claimant was continuously exposed for eleven years, was liable for payment of compensation; that the insurance carriers who successively covered such liability of the employer during the period of claimant's last employment were jointly, equally and severally responsible for the discharge of the duties and obligations of the last employer in respect of such liability; and that, as a result of the injury sustained, claimant had suffered permanent partial disability equivalent to 13.8% binaural loss of hearing compensable under the Longshoremen's and Harbor Workers' Act at the maximum rate of $35.00 a week for 27.6 weeks, or a total amount of $966.00.

The employer and the three insurance companies involved appealed to the District Court from the Deputy Commissioner's award. The District Court granted defendants' motion for summary judgment dismissing the complaint. Thereafter the employer and the three insurance companies appealed to the U. S. Court of Appeals for the Second Circuit. By unanimous decision entered on July 19, 1955 the U. S. Court of Appeals for the Second Circuit affirmed the order of the District Court but remanded to that Court with directions to fix the liability not only on the last employer but upon the last carrier. The only petitioner herein is the last carrier, The State Insurance Fund. *The other insurance carriers, the American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company and*

Hartford Accident & Indemnity Company the claimant and the United States Government have accepted the decision of the U. S. Court of Appeals.

Questions Presented

The petitioner raises three questions before this Court.

1. Where there admittedly was no impairment of wage earning capacity, was the award to claimant Johansen for a partial loss of hearing contrary to law as enacted by the Congress and therefore illegal and void?
2. Where the only provision relating to occupational disease is contained in the definition of injury so as to include occupational disease, thus leaving it entirely to the Deputy Commissioners to determine what an occupational disease is; when it arises; in whose employ the disablement occurred, without any statutory rules or guides of conduct is an unlawful delegation of legislative power.
3. Did the decision of the court below holding liable the carrier who last insured the "liable" employer to the exclusion of two other carriers for the same employer deprive said last carrier of its constitutional rights under its contract of insurance in direct violation of the provisions of the Constitution of the United States?

This respondent will answer each question in sequence.

POINT I

Since occupational loss of hearing is a scheduled injury, loss of wage earning capacity and its extent are conclusively established and therefore the award to claimant Thorleif Johansen was in accordance with law.

The salient sections of the Longshoremen's and Harbor Workers' Act (hereinafter called the Longshoremen's Act) relative to the above are 33 U. S. C. A. Section 902(2), 33 U. S. C. A. Section 908(c) 1-20, 33 U. S. C. A. Section 908(c) 13, 33 U. S. C. A. Section 908(c) 21.

Injury as defined in the Longshoremen's Act includes both accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment. 33 U. S. C. A. Section 902(2).

Section 908 concerns itself with compensation to be paid to a claimant for disability. Section 908(c) 1-20 states the type of payment to be awarded to the claimant for scheduled injuries. Section 908(c) 1-20 are concerned with awards for measurable injuries such as arms, legs, ears, eyes, etc. Nowhere in this group is wage earning impairment mentioned. In Section 908(c) 13 is found provision for compensation to be paid for loss of hearing.

Section 908(c) 21 concerns itself with non-scheduled awards and it is there that wage impairment must be proven and is not conclusively presumed. The type of injury that arises under Paragraph 21

are head, back injuries, etc. and other non-measurable injuries.

Petitioner concedes that loss of hearing is a scheduled injury (Page 6 of petition). Its only contention is that since Section 902 Subdivision 10 defines disability as meaning "incapacity because of the injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment", it is necessary to prove actual loss of earnings in scheduled cases.

The definition of disability must be read in conjunction with Section 908(c) 1-20. There is no clearer expression of legislative intent than the language found therein and one can only conclude that loss of wage earning capacity and its extent have been legislatively fixed in the Statute and need not be established. See "Workmen's Compensation Law", by Larson, Vol. 2, sec. 58.10. *H. K. Toy & Novelty Co.* v. *Richards,* 68 Ind. App. 653, 117 N. E. 260 (1917); *Franko* v. *William Schollhorn Co.,* 93 Conn. 13, 104 A. 485 (1918); *Lents* v. *Lucci,* 275 Pa. 217, 119 A. 132 (1922), 24 A. L. R. 1462; *Dombrozzi* v. *E. Gross & Co.,* 112 Conn. 627, 1953 A. 780 (1931); *Catlett* v. *Chattanooga Handle Co.,* 165 Tenn. 343, 55 S. W. 2d 257 (1933); *Ossie* v. *Verde Central Mines,* 46 Ariz. 176, 49 P. 2d 396 (1935); *New Jellico Coal Co.* v. *Gilbruth,* 187 Tenn. 606, 216 S. W. 2d 329 (1949); *Williams* v. *Ind. Comm.,* 73 Ariz. 57, 237 P. 2d 471 (1952); *Nicely* v. *Virginia E. & P. Co.,* 195 Va. 819, 80 S. E. 2d 529 (1954); *Green Bay D. F. Co.* v. *Ind. Comm.,* 265 Wis. 38, 60 N. W. 2d 409, rehearing denied *Green Bay D. F. Co.* v. *Wojcik,* 265 Wis. 38, 61 N. W. 2d 847 (1954); *Rowe* v. *McGovern,*

254 App. Div. 432, 5 N. Y. S. 2d 626 (1938); *Slawinski* v. *Williams,* 273 App. Div. 826, 76 N. Y. S. 2d 888 (1948), Aff'd 298 N. Y. 546, 81 N. E. 2d 93 (1948).

Judge Medina in the instant case in writing the decision for a unanimous court in the U. S. Court of Appeals states:

> "having concluded that the statutory schedules apply 'to injuries' resulting from occupational disease it remains for us to point out only that in the case of schedule losses, the Congress has determined that a loss of wage earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment."

Judge Medina also distinguished the case of *Iacone* v. *Cardillo,* 208 F. 2d 696 (C. A. 2, 1953) cited by the petitioner in support of its impairment of wage concept. The Iacone case was one wherein a claim was made for an award because of an eye injury. The claimant had a complete loss of use of the eye prior to the industrial accident upon which the claim was based. The Court stated that the schedule award provisions did not contemplate payment of compensation for a pre-existing sightless eye. This is not the claim in the instant case nor does the petitioner allege any pre-existing loss of hearing of the nature found in the Iacone case. It is significant to note that Judge Medina wrote the decision in both the Iacone case and the instant case.

Therefore, since impairment of wage earning is conclusively presumed in a scheduled injury and since

loss of hearing is one of the scheduled injuries, U. S. C. A. Section 908(c) 13, the Deputy Commissioner's award was made in accordance with Law.

POINT II

There is no delegation of legislative power within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

Petitioner contends that since the only provision relating to occupational disease is in the definition of injury the legislature has delegated to the administrator the determination as to what is an occupational disease, when it arises and in whose employ the disablement occurred. Nothing is further from the facts.

It has long been a recognized fact that hearing can be impaired in one's occupation by exposure to loud and continuous noises over a period of time. Industrial Hygiene, Lindsay and Goldberg (1937) page 577; Trauma, Disease, Compensation, Frazier (1930).

By decision the Federal Courts have accepted occupational diseases as those which result from the nature of the employment. In *Chausse* v. *Lowe,* 35 F. Supp. 1011 (N. Y. 1938) the District Court adopted the definition of occupational disease set out in *Goldberg* v. *954 March Corp.,* 276 N. Y. 313, 12 N. E. 2d 311, 313 (1938), as follows:

> "Thus an occupational disease is one which results from the nature of the employment, and by nature is meant, not those conditions brought about by the failure of the employer to furnish a

> safe place to work, but conditions to which all employees of a class are subject, and which produces the disease as a natural incident of a particular occupation, and attached to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general."

See also *McNeely* v. *Sheppard,* 89 F. 2d 956 (C. A. 5, 1937), *Grain Handling Co.* v. *Sweeney,* 102 F. 2d 464 (C. A. 2, 1939).

Impairment of hearing like other occupational diseases is a cumulative injury and it would be impossible for the legislature to enact a rule wherein a fixed date for the arising of said disease would be established. The Supreme Court showed an awareness of the very problem in the case of *Urie* v. *Thompson,* 337 U. S. 163. In the *Urie* case, the United States Supreme Court stated:

> "* * * The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. 'It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves * * *' Associated Indemnity Corp. v. Industrial Accident Commission, 124 Cal. App. 378, 381, 12 P. 2d 1075, 1076."

Another difficulty which confronted the courts has been the question of in whose employ the disablement occurred. Due to the nature of an occupational disease, the courts have held that the injury occurs in the employ where the employee is working at the time he becomes disabled. *Urie* v. *Thompson,* 337 U. S. 163; *North End Foundry Co.* v. *Ind. Comm.,* 217 Wis. 363, 258 N. W. 439, 443 (1935); *Zurich General Accident & Liability Ins.* v. *Ind. Comm.,* 203 Wis. 135, 233 N. W. 772 (1930); *Gillespie & Sons* v. *Johnson,* 167 Okla. 83, 27 P. 2d 814 (1933); *Bergeron's Case,* 243 Mass. 366, 137 N. E. 739 (1933); *Textileather Corp.* v. *Great American Indemnity Co.,* 108 N. J. Law 121, 156 A. 840 (1931).

The Legislature in enacting the Longshoremen's Act was fully cognizant that in occupational disease cases the employer at the time of disablement would bear the entire expense for the injury. See Hearing of Committee on the Judiciary of the House of Representatives, 69th Congress, First Session on H. R. 9498, which was the House equivalent of S. 3170, which ultimately became the Longshoremen's Act, with particular attention to pp. 74 and 115 of said hearings. Thus it can be seen that both the legislature and the employer were cognizant at the inception of the Act that the employer in the last employment when the disablement occurred would be solely liable for compensation to the injured employee.

In the instant case, the record shows that the claimant was exposed to injurious industrial noises while employed by Ira S. Bushey & Sons, Inc. as a shipfitter and carpenter from 1930 to 1940, and from 1942 to 1953 (transcript 12 etc. T. 12). Around December 1952 which would be during the last period of em-

ployment the claimant noticed some buzzing and ringing in his ears and in January or February 1953 he noticed a loss of hearing (T. 18). On September 16, 1953 when the condition persisted the claimant went to a doctor for examination (T. 19). It was then for the first time he knew that his loss of hearing was due to his employment (T. 21). All the doctors who examined the claimant for the insurance carriers and otherwise testified that there was a loss of hearing and that it was due to claimant's employment (see Exhibit B) (T. 127, 128). Exhibit 1 (T. 130, 131, 132) the loss is permanent (T. 69, 137).

The Deputy Commissioner when he made his award based it on the above testimony both lay and medical. It is evident therefore, that the award was not made by arbitary action on the part of the Deputy Commissioner.

The legislature has provided ample protection against injustice in the Act by permitting an injured party to avail himself of the Courts if a compensation order is not in accordance with Law (see 33 U. S. C. 921B.)

From the above it is obvious that from the nature of an occupational disease it would have been impossible for the legislature to enact any additional statutory rules than presently are found in the Act itself. The Deputy Commissioner acted within the framework of the Longshoremen's Act in the administration of it and there is no evidence whatsoever of any delegation of legislative power.

POINT III

Constitutional questions not raised in the lower courts cannot be raised for the first time in the United States Supreme Court.

The petitioner is now contending for the first time that its property is being taken away without due process of law and therefore, in violation of Amendment V of the Constitution. The petitioner did not raise this issue before the Deputy Commissioner nor before the trial or Appellate Courts.

There is no clearer rule of law than the proposition that the Supreme Court will not consider a constitutional question raised for the first time on appeal. *Western Union Telegraph Co.* v. *Winland,* 182 F. 493, 104 C. C. A. 439 (1910); *Wabash Ry. Co.* v. *City of St. Louis, Mo.,* 54 S. Ct. 88, 290 U. S. 668 (1933); *Polizzi* v. *Cowles Magazines, Inc.,* 73 S. Ct. 900, 345 U. S. 663; *Shelley* v. *Kraemer,* 68 S. Ct. 836, 334 U. S. 1; *McGhee* v. *Sipes,* 68 S. Ct. 836, 334 U. S. 1; *Keyes* v. *Madsen,* 179 F. 2d 40, 86 U. S. App. D. C. 24, certiorari denied, 70 S. Ct. 628, 339 U. S. 928.

Thus, since the petitioner cannot raise a constitutional question before this Court for the first time, the discussion in petitioner's brief concerning this question must be completely disregarded (Pages 14-19 of petitioner's brief).

Conclusion

The decision of the U. S. Court of Appeals written by Judge Medina in the instant case and made a part of petitioner's appendix answers logically and succinctly the relevant questions raised by the petitioner.

It is respectfully submitted therefore, that this petition should be denied.

Respectfully submitted,

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